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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RALPH ALAN DELL, Defendant and Appellant.	A143466 (Contra Costa County Super. Ct. No. 05-121145-7)

INTRODUCTION

Defendant Ralph Alan Dell appeals from his conviction for committing a lewd act on his nine-year-old niece. (Pen. Code, § 288, subd. (a).)[1] He argues the court committed reversible instructional error. We affirm.

STATEMENT OF THE CASE

An information filed in Contra Costa County charged defendant with engaging in sexual acts (oral copulation or sexual penetration) with Jane Doe, a child 10 years old or younger (count 1). (§ 288.7, subd. (b).) It also charged him with committing a lewd act on Jane Doe, a child under the age of 14 (count 2). (§ 288, subd. (a).) Both counts involved the same child and were allegedly committed on April 12, 2012. In connection with count 2, the information also alleged defendant was ineligible for probation because he had substantial sexual conduct with Jane Doe. (§ 1203.066, subd. (a)(8).)

[1] All further statutory references are to the Penal Code.

On July 2, 2014, a jury convicted defendant of count 2, and found true the substantial sexual conduct allegation. Defendant was acquitted of count 1. On September 5, 2014, the court sentenced defendant to prison for six years.

STATEMENT OF THE FACTS

Jane Doe was 11 years old at the time of trial in 2014. Defendant is Jane Doe's uncle by marriage to her mother's sister. In April 2012, when Jane Doe was nine years old, she went to her uncle's home to have a sleepover with defendant's daughter, her cousin E.

Defendant was on the floor watching television with the two girls. Blankets for sleeping were placed on the living room floor for the three of them. Jane Doe was between defendant and E. E. fell asleep, and defendant asked Jane Doe if she wanted a back tickle. She said "no thank you," but defendant rubbed her back anyway. When Jane Doe flipped over onto her back, defendant tickled her stomach. Then he put his hands inside her underwear and fingered her in her private part. This made her private part "hurt really bad" and Jane Doe started to cry, but she said nothing. Defendant asked her, "Does that hurt?" Jane Doe was shocked by defendant's behavior.

Defendant continued to touch her for about five minutes. His finger did not actually go inside of her. Then he stopped and said it was inappropriate. He went into the kitchen and might have washed his hands. On cross-examination, Jane Doe testified defendant acted in a way that made her think he was asleep; "only his hand was moving and he wasn't doing anything else." After he was "done fingering [her] . . . [¶] . . . [¶] [i]t looked like he was pretty surprised." About an hour or two after the touching, E.'s grandmother came to the house.

The next morning, defendant took the girls to the Jungle, a place where children can play and eat, and then drove Jane Doe to her father's house. When Jane Doe saw her father, she told him defendant touched her private parts. According to Jane Doe's father, Jane Doe told him defendant rubbed her back, her stomach and then tried to put his finger in her vagina. Jane Doe was crying, and her father called the police. The 911 call placed by Jane Doe's father on April 12, 2012 was admitted into evidence.

After the police left Jane Doe's father's house, Jane Doe's parents took her to the hospital. The results of her SART (Sexual Assault Response Team) examination were consistent with Jane Doe's report of a sexual assault.

Jane Doe gave a taped statement to Deputy Drolette on April 12, 2012. She also gave a recorded statement to an interviewer at the Children's Interview Center (CIC) on April 16, 2012. Both statements were admitted at trial, and both are consistent with her testimony and her disclosure to her father. Jane Doe told both Deputy Drolette and Pat Mori, the CIC interviewer, she thought defendant might have been asleep when he touched her.

Defendant was arrested on April 13, 2012, by Deputy Drolette.

Defense Case

Defendant's mother testified she went to defendant's place at 4:30 a.m. after he called her. The girls were asleep on the living room floor. Defendant looked very upset. He said he fell asleep while rubbing Jane Doe's back; when he woke up he was holding Jane Doe as if she were his girlfriend. She asked him if he put his hands in Jane Doe's pants; defendant buried his face in his hands and said he did not know.

Defendant's brother testified he shared a room with defendant for about 14 years and defendant talked in his sleep about once a week. Defendant's ex-wife recalled one incident when defendant talked to her on the phone when he "must have been sleeping or half awake." Later, he had no memory of the call. On "a handful of times" defendant initiated sex while he was half asleep, and he would wake up "during it." She explained that by "half asleep" she meant groggy and not actually asleep.

Defendant testified in his own behalf. He fell asleep and when he awoke his hand was in Jane Doe's pants and he was touching her vagina. He freaked out and said, "This is not appropriate." Fifteen minutes later, he called his mother and asked her to come over. He told her he grabbed Jane Doe like a girlfriend, but he was ashamed to tell her everything. "Words cannot describe how sorry" he is. He did not think anybody would believe him.

Dr. Michel Cramer Bornemann is board certified in sleep medicine and is the medical director of Sleep Medicine Services at Health East Hospital in Minnesota. He testified as an expert in parasomnia, including sex-related conduct. Dr. Cramer Bornemann described parasomnia as "our unusual behaviors or experiences that arise into sleep, within sleep, or from arousals out of sleep," including sexualized behaviors. He testified that "parasomnias are typically without awareness, although there might be some degree of awareness. But the point is their response is inappropriate without complete full consciousness."

Dr. Cramer Bornemann first reviewed documents in defendant's case in January 2013. Later, he had two phone calls with defendant. However, he never had a face-to-face interview with defendant, and he did not test defendant for malingering. Based on the phone calls and the information he was provided, Dr. Cramer Bornemann diagnosed defendant with parasomnia.

In his testimony, Dr. Cramer Bornemann first discussed at length how sleep works in general. He showed two videos of individuals in sleep labs. He also discussed guidelines developed since the late 1980's to evaluate reported acts of violence that could be potentially attributed to a sleep disorder or condition. The first guideline is whether the person has a history of prior behaviors. The second guideline is whether the duration of the action is short. The third guideline is whether the action is abrupt, immediate and senseless without apparent motivation. The fourth guideline is whether the behavior occurred during the first half or first third of sleep. The fifth guideline is whether the victim is someone who just happens to be in close proximity. The sixth guideline is whether, upon return to consciousness, there is perplexity, no attempt to escape, conceal, or cover up the action. The last guideline is whether there is voluntary intoxication, which precludes the sleepwalking defense. In his testimony Dr. Cramer Bornemann compared these guidelines with the information about defendant's history and behaviors that were provided to him. Dr. Cramer Bornemann concluded: "[A]ssuming Mr. Dell to be honest with his information and honest with what he relayed to me, and I have no

reason to question that with my interaction and review, I believe that these behaviors were consistent with a non REM parasomnia."

People's Rebuttal

Dr. Rafael Pelayo is a physician at the Stanford University Sleep Disorders Clinic and a professor at the medical school. He testified as an expert in the area of sleep disorders, parasomnia and abnormal sexual behaviors. Dr. Pelayo defined parasomnia as a medical condition in which abnormal behaviors occur during sleep.

Dr. Pelayo reviewed police reports and other documents received from the prosecutor, including the defense expert's report. Using the same criteria used by Dr. Cramer Bornemann—prior history; no attempt to conceal; brief, abrupt, immediate action; proximity to the victim by happenstance; time during sleep; and intoxication—Dr. Pelayo testified defendant's behavior was inconsistent with parasomnia in several ways. Furthermore, he would not diagnose parasomnia without actually seeing a patient.

Deputy Drolette testified defendant told him that when his girlfriend slept over, he would sometimes awaken with his fingers in her vagina.

During Officer Zamora's testimony the parties stipulated that defendant's ex-wife stated that the sexual activity between her and defendant occurred an hour or so after they went to bed and not within minutes of going to sleep.

Cayla Ballantine hung out with defendant one time at his house. She was never his girlfriend. On that occasion he put his fingers in her vagina after they consumed a lot of alcohol, when they were both awake.

DISCUSSION

Defendant argues the trial court gave misleading and ambiguous instructions when it instructed, as to count 1 only (on which the jury acquitted), that the People were required to prove "the defendant knew the nature of the act he was committing" and

failed to similarly instruct on count 2.[2] He argues that in combination these two instructions implied to his detriment that the knowledge requirement did not apply to count 2, and that the ambiguity requires reversal of count 2.

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[2] The trial court modified CALCRIM No. 1128 in a number of particulars. Modifications are noted in bolded italics. It instructed the jury on the elements of a violation of section 288.7, subdivision (b) as follows:

"The defendant is charged in Count One with sexual penetration of a child ten years of age or younger in violation of Penal Code section 288.7(b).

"To prove that the defendant is guilty of this crime, the People must prove that:

"***First,*** the defendant engaged in an act of sexual penetration with Jane Doe;

"***Second, the defendant knew the nature of the act he was committing;***

"Third, the defendant committed the act for the purpose of sexual abuse, arousal, or gratification;

"***Fourth,*** when the defendant *committed the act*, Jane Doe was 10 years of age or younger;

"***And fifth,*** at the time of the act, the defendant was at least 18 years old.

"Sexual penetration means penetration, however slight, of the genital or anal opening of the other person by any foreign object, substance, instrument, device, or any unknown object for the purpose of sexual abuse, arousal, or gratification.

"Penetration for sexual abuse means penetration for the purpose of causing pain, injury, or discomfort.

"A foreign object, substance, instrument, or device includes any part of the body except a sexual organ.

"Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.

"***It is not a defense to this charge that the child may have consented to the act or that the defendant was mistaken as to the age of Jane Doe.***" (See CALCRIM No. 1128; CALJIC No. 10.59.6.)

There is some dispute about whether penetration of a child 10 years and under, and forcible sexual penetration (§§ 288.7, subd. (b), 289, subd. (a)(1)(A)) are specific or general intent crimes. (Compare *People v. ZarateCastillo* (2016) 244 Cal.App.4th 1161, 1167–1168; *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1380.)

With two minor modifications ((1) "the defendant committed the act with a ***specific*** intent . . ." and (2) "[i]t is not a defense to this charge that . . . the defendant was

When the defendant challenges the correctness of the court's instructions as ambiguous and/or misleading on various points, we review the asserted error in light of well-settled principles. "We conduct independent review of issues pertaining to instructions." (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411, citing *People v. Waidla* (2000) 22 Cal.4th 690, 733, 737.) When the defendant challenges the adequacy of the instruction as ambiguous or potentially misleading, our principal task is to determine " ' " ' "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution' " ' " or California law. (*People v. Ayala* (2000) 24 Cal.4th 243, 289; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Clair* (1992) 2 Cal.4th 629, 662–663.) We determine the correctness of the challenged instruction "in the context of the instructions as a whole and the trial record," and not " 'in artificial isolation.' " (*Estelle v. McGuire*, at p. 72; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Thus, for example, " ' "[t]he absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." ' " (*Musselwhite*, at p. 1248.)

The defense at trial was unconsciousness due to parasomnia, a form of somnambulism, i.e., sleepwalking. The court gave a modified version of CALCRIM No. 3425 as to both counts.[3] "An unconscious act within the contemplation of the Penal

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mistaken as to the age of Jane Doe") the court's instruction on the count 2 violation of section 288, subdivision (a) follows CALCRIM No. 1110.

[3] The court instructed as follows:

"The defendant is not guilty of the offenses charged in Counts One or Two, or the lesser-included offense of Count Two, which is simple battery, ***if the charged act or acts acts were committed while he was legally*** unconscious. Someone is legally unconscious when he or she is ***not aware of or*** conscious of his or her actions.

"***You have heard the testimony that unconsciousness is a mental state that may accompany an act committed during parasomnia, that is, sleepwalking.*** Unconsciousness may ***also*** be caused by ***other things such as*** a blackout or an epileptic seizure. Someone may be unconscious even though he or she may be able to move.

"The People must prove beyond a reasonable doubt that the defendant was conscious when he acted. If there is proof beyond a reasonable doubt that the defendant

Code is one committed by a person who because of somnambulism, a blow on the head, or similar cause is not conscious of acting and whose act therefore cannot be deemed volitional." (*People v. Sedeno* (1974) 10 Cal.3d 703, 717, overruled on other points in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 & *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn.10; see *People v. Chaffey* (1994) 25 Cal.App.4th 852, 856; *People v. Boyes* (1983) 149 Cal.App.3d 812, 819.) Unconsciousness, if *involuntarily* induced, is a complete defense to a criminal charge pursuant to Penal Code section 26, class Four. (*People v. Kelly* (1973) 10 Cal.3d 565, 573, superseded by statute on anther point, as stated in *People v. Boyer* (2006) 38 Cal.4th 412, 469–470, fn. 41; *People v. Cruz* (1978) 83 Cal.App.3d 308, 330; *People v. Halvorsen* (2007) 42 Cal.4th 379, 417.)

Defendant does not challenge the correctness of these instructions by the court. The trial court did not instruct on the relevance of voluntary intoxication to unconsciousness (CALCRIM No. 3426), and defendant does not challenge that decision. The trial court also instructed that both counts required proof of specific intent, and defined the term "willfully" as used in CALCRIM No. 1110.

Defendant candidly admits "knowledge of the nature of the act" is not included as an element in the standard instructions on unconsciousness, CALCRIM No. 1128 or CALJIC No. 10.59.6. Nor does it appear in any published or nonpublished case in connection with section 288.7 or other sexual offense. Its genesis in this case is not discussed on the record below. It does appear in CALCRIM No. 626, on the effect of voluntary intoxication causing unconsciousness in a homicide case: "Voluntary intoxication may cause a person to be unconscious of his or her actions. A very intoxicated person may still be capable of physical movement but may *not be aware of his or her actions or the nature of those actions*." (CALCRIM No. 626; italics added.)

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acted as if he ***was*** conscious ***at the time of the charged act or acts, you may, but are not required to,*** conclude that he was conscious. ***If, however,*** based on all the evidence, you have a reasonable doubt ***whether the defendant was conscious when the act or acts were committed,*** you must find the defendant not guilty." (See CALCRIM No. 3425, CALJIC Nos. 4.30, 4.31.)

It also appears in section 261, subdivision (a)(4), defining rape of an unconscious person as "an act of sexual intercourse . . . [¶] . . . [¶] (4) [w]here a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, 'unconscious of the nature of the act' means incapable of resisting because the victim meets one of the following conditions: [¶] (A) Was unconscious or asleep. [¶] (B) Was not aware, knowing, perceiving, or cognizant that the act occurred." (See CALCRIM No. 1003 ["A woman is unconscious of the nature of the act if she is unconscious or asleep or not aware that the act is occurring . . . ."].) The phrase also appears in section 289, subdivision (d): "Any person who commits an act of sexual penetration, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, 'unconscious of the nature of the act' means incapable of resisting because the victim meets one of the following conditions: [¶] (1) Was unconscious or asleep. [¶] (2) Was not aware, knowing, perceiving, or cognizant that the act occurred." (See § 243.4, subd. (c) ["Any person who touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act. . . is guilty of sexual battery."].) And, the phrase appears in section 261.6, which defines consent as acting "freely and voluntarily and hav[ing] knowledge of the nature of the act or transaction involved."

In a totally different context, the phrase "knowledge of the nature of the act" recalls the definition of insanity in section 25, subdivision (b): "[T]his defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of *knowing* or understanding *the nature* and quality *of his or her act* and of distinguishing right from wrong at the time of the commission of the offense." (Italics added; see CALCRIM No. 3450.)

That there is no known explanation for the court's inclusion of "knowledge of the nature of the act" as an element of the charged offense does not make that inclusion correct. Section 288.7, subdivision (b) provides: "Any person 18 years of age or older

who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life." Manifestly, knowledge of the nature of the act is not one of the statutory elements of section 288.7, subdivision (b). Assuming the phrase "knowledge of the nature of the act" in the challenged instruction was borrowed from one of statutes mentioned above for the purpose of clarifying the definition of consciousness, defendant does not explain why the court should have instructed that *any* definition of unconsciousness was an element of the charged crime. As our Supreme Court explained in *People v. Babbitt* (1988) 45 Cal.3d 660 at page 693: "Unconsciousness is a defense. (§ 26.) Although the state, once the defendant raises the issue, has assumed the burden of disproving unconsciousness, this fact of itself does not transform absence of the defense—consciousness—into an element of murder for purposes of due process analysis. This is true even though unconsciousness negates the elements of voluntariness and intent, and when not voluntarily induced is a complete defense to a criminal charge. [Citations.] [¶] . . . [C]onsciousness is not an element of the offense of murder (nor of any offense)." It was error for the court to instruct the jury that "knowledge of the nature of the act" was an element of section 288.7 subdivision (b).

Since it was error to instruct the jury that knowledge of the nature of the act was an element of the offense which the People must prove beyond a reasonable doubt, it would have been error to have included that language in the instruction on the elements of a section 288 subdivision (a) violation. Knowledge is no more a statutory element of that offense than it is of the offense defined in section 288.7 subdivision (b).[4] The error

[4] Section 288, subdivision (a) provides: "Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years." Section 288, subdivision (i) provides for a life sentence if it is pleaded and proven that the defendant personally inflicted bodily harm on the victim.

committed in this case benefitted the defendant by placing on the People the burden of proving beyond a reasonable doubt a nonexistent element of section 288.7, subdivision (b). Whether for that reason or some other—the record does not reflect the jury's reasoning—defendant was acquitted of an offense for which there is substantial support in the trial record. Defendant cannot complain on appeal there is a reasonable chance he would have been acquitted of the section 288, subdivision (a) violation as well if the court had repeated the error with respect to count 2. "It has long been the rule in this state that, in the absence of prejudice, a defendant may not complain of error favorable to the defendant, including the giving of correct, but inapplicable, instructions and return of a verdict of an offense less than that which the evidence shows." (*People v. Lee* (1999) 20 Cal.4th 47, 57.)

In any event, in light of the instructions as a whole, it is not reasonably likely the jury " ' " ' "applied the challenged instruction in a way" that violates the Constitution' " ' " or California law. (*People v. Ayala, supra,* 24 Cal.4th at p. 289; *Estelle v. McGuire, supra,* 502 U.S. at p. 72; *People v. Clair, supra,* 2 Cal.4th at p. 662–663.) CALCRIM No. 3425, as given here, expressly applied to both counts and informed the jury "unconsciousness was a complete defense, that evidence *had been received* which tended to show that defendant was unconscious, and that if it had a reasonable doubt that defendant was conscious, it *must* find him not guilty." (*People v. Babbitt, supra,* 45 Cal.3d at p. 696.) Unconsciousness was the defense presented here through expert and lay testimony, and upon which defendant was entitled to receive, and did receive, correct instructions. There is no reasonable likelihood the jury understood the unconsciousness defense applied only to count 1. As there was no recognized defense to the charged sex offenses based on lack of knowledge of the nature of the acts, apart from unconsciousness, defendant was not prejudiced by the failure to instruct on a nondefense to count 2.

DISPOSITION

The judgment is affirmed.

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Dondero, J.

We concur:

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Humes, P. J.

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Margulies, J.